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20 **STATE OF CALIFORNIA**

21 **NEW MOTOR VEHICLE BOARD**

22 In the Matter of the Protest of)

23 MATHEW ENTERPRISE, INC., d/b/a)
24 STEVENS CREEK CHRYSLER JEEP)
25 DODGE AND RAM,)

26 Protestant,)

27 v.)

28 FCA US, LLC,)

Respondent.)

Protest Nos.: PR-2484-16, PR-2485-16, PR-2486-16, and PR-2487-16

REPLY IN SUPPORT OF MOTION TO DISMISS PROTESTS

Respondent FCA US, LLC ("FCA") hereby submits this Reply in Support of its Motion to Dismiss Protest Nos. PR-2484-16, PR-2485-16, PR-2486-16, and PR-2487-16 (the "Protests").

INTRODUCTION

On January 9, 2017, FCA filed its Motion to Dismiss Protests ("Motion to Dismiss")¹, and on January 24, 2017, Protestant Mathew Enterprise, Inc., d/b/a Stevens

¹ FCA incorporates by reference the information, arguments and legal authority contained in its Motion to Dismiss as though fully set forth herein.

1 Creek Chrysler Jeep Dodge and Ram ("Protestant") filed its Opposition to FCA's
2 Motion to Dismiss ("Response").

3 In the Response, Protestant contends that FCA failed to establish proper grounds
4 for dismissal of the Protests and that FCA misinterpreted certain legal authority cited
5 in its Motion to Dismiss. For the reasons set forth below, both of these contentions are
6 erroneous. FCA has indeed shown a basis to dismiss the Protests and the cases cited in
7 FCA's Motion to Dismiss support this position. Simply put, Protestant cannot
8 manufacture a cause of action for termination, constructive or otherwise, where no
9 termination of any kind is taking place. Accordingly, FCA respectfully requests that
10 the California New Motor Vehicle Board (the "Board") dismiss with prejudice the
11 Protests filed by Protestant because, among other reasons, the Protests are not ripe as
12 FCA is not presently seeking to terminate Protestant's dealer agreements.

13 LAW AND ARGUMENT

14 *A. There are no Unresolved Factual Questions Preventing Dismissal of the Protests.*

15 Contrary to Protestant's contentions, FCA has established that dismissal of the
16 Protests is warranted in this case. In its Response, the Protestant conceded that the
17 Board has authority to dismiss protests. *See* Response at p. 7. Protestant argued,
18 however, that dismissal is not appropriate in this case because the Board's authority to
19 dismiss only applies "where, analogous to a summary judgment motion, a respondent
20 establishes that 'undisputed facts demonstrate good cause for franchise termination as
21 a matter of law and afford no basis for preventing termination of the franchise.'" *Id.*

22 In making this argument, the Protestant glosses over the fact that the Board must
23 first have jurisdiction to hear the evidence. Here, the Board has no jurisdiction to hear
24 any evidence as FCA is not seeking to terminate Protestant's dealer agreements.
25 Protestant's argument that FCA must establish good cause for termination as a matter
26 of law when, in fact, there is not a termination proceeding at issue is nonsensical. To
27 the contrary, FCA's Motion to Dismiss should be granted, because, as a matter of law,
28

1 FCA is not pursuing any termination measures against Protestant. To be clear, no
2 unresolved factual issues remain because this is not a termination action.

3 ***B. Protestant's Argument Relative to Written Notice is a Red Herring.***

4 Protestant coyly argues that the lack of written notice is yet another basis for its
5 Protests. But the reason for this is clear, as is the reason why the lack of a notice
6 should not serve as a basis for the Protests—there is no termination, whether actual or
7 imagined, for which FCA could issue a notice.

8 Protestant cited *British Motor Car Distributors, Ltd. v. New Motor Vehicle Bd.*,
9 194 Cal. App. 3d 81, 93, 239 Cal. Rptr. 280 (Ct. App. 1987) in support of the
10 proposition that “the absence of a written termination notice by FCA to Protestant
11 ‘does not prevent the [Board] from exercising its powers to resolve’ this dispute.” In
12 *British Motor Car Distributors, Ltd. v. New Motor Vehicle Bd.*, it was found that
13 although the motor vehicle distributor did not issue a proper termination notice to the
14 dealer under Cal. Veh. Code § 3060, the Board had jurisdiction over the termination
15 protest at issue.

16 However, *British Motors* is distinguishable from this case because in *British*
17 *Motors*, there was no dispute that the case indeed involved the termination of a
18 dealership and that the distributor was, in fact, moving forward with a termination
19 proceeding. By contrast, in this case, FCA has not, and is not, pursuing termination of
20 Protestant’s dealer agreements. The fact that FCA has not issued a notice of intent to
21 terminate provides additional evidence that FCA is not seeking termination against
22 Protestant; it should not serve as a basis or foundation for the Protests.

23 ***C. Purported De Facto Terminations are not Within the Board's Jurisdiction.***

24 The Protestant attempted to show that this case falls under the purview of the
25 Board’s jurisdiction by citing *Ri-Joyce, Inc. v. New Motor Vehicle Bd.*, 2 Cal. App. 4th
26 445, 3 Cal. Rptr. 2d 546 (1992). Protestant argued that “no active effort to terminate”
27 was involved in *Ri-Joyce*, and as a result, it was proper for the Board to exercise
28 jurisdiction over that protest.

1 Protestant's argument mischaracterizes the facts at issue in *Ri-Joyce* because *Ri-*
2 *Joyce* concerned not termination of the protestant's dealer agreement, but a proposed
3 modification or replacement of the protestant's dealer agreement under Veh. Code §
4 3060(b). *See Ri-Joyce*, 2 Cal. App. 4th 445 at 458 ("the unilateral establishment of a
5 nearby dealership without conferring with Ri-Joyce and without any attempt at
6 justification pursuant to the contract would constitute an attempted modification of the
7 contract which would be subject to protest under section 3060.").

8 Indeed, there was "no active effort to terminate" in *Ri-Joyce* because the
9 protestant in that case was not protesting a proposed termination. Instead, the
10 protestant was protesting, pursuant to § 3060(b), a proposed modification of its dealer
11 contract. In this case, FCA is neither attempting to terminate Protestant's dealer
12 contract under § 3060(a), nor modify or replace Protestant's dealer agreement under §
13 3060(b). As such, the Protests do not present a matter within the Board's jurisdiction
14 under Cal. Veh. Code. § 3060.

15 Furthermore, Protestant's reading of *Roadtrek Motorhomes v. California New*
16 *Motor Vehicle Board*, No. G049534, 2016 WL 3885006 (Cal. Ct. App. July 14, 2016)
17 is also incorrect. In its Response, Protestant argued that Roadtrek stands to show that
18 the Board held a lengthy evidentiary hearing on protests concerning a purported de
19 facto termination. *See Response* at p. 9. Yet, this is an incomplete and inaccurate
20 portrayal of what occurred in the case.

21 The protestant in *Roadtrek* originally filed eighteen protests with the Board
22 concerning, among other things, termination and alleged de facto termination of
23 protestant's dealer contracts. *See Roadtrek*, No. G049534, 2016 WL at *3. Prior to the
24 hearing in the case, the Board dismissed six of the eighteen protests. *Id.* During the
25 hearing, the Board considered the protestant's protests as to the statutory termination
26 proceedings that the manufacturer was pursuing under the California Vehicle Code. *Id.*
27 at *5. However, the Board declined to hear, as separate termination protests, the
28

1 dealer's claims of de facto termination, finding that the de facto termination claims
2 exceeded the Board's jurisdiction. *Id.*

3 Importantly, the Board only considered the facts of the purported de facto
4 termination as those facts related to the Board's consideration of the actual statutory
5 termination proceedings. *Id.* Both the trial court and the California Court of Appeals
6 upheld the Board's determinations on this issue. *See Id.* at *7 ("Merely because some
7 of the facts forming the foundation for a civil action were asserted as the foundation
8 for [the protestant's] statutory protest claim did not expand the scope of the Board's
9 authority to determine whether [the manufacturer's] actions in late 2009 and early
10 2010 constituted a de facto termination.").

11 In its Response, the Protestant cited four additional cases in a further attempt to
12 show that circumstances other than statutory termination proceedings have been
13 considered to be de facto terminations with the jurisdiction of a motor vehicle board.
14 Yet, all of these cases are either distinguishable from the Protests at issue in this case
15 or irrelevant to this inquiry.

16 Two of the four cases cited by Protestant, *Glick v. General Motors*, 865 F.2d
17 494 (2nd Cir. 1989) and *Robert Basil Motors, Inc. v. General Motors Corp.*, 2004 WL
18 1125164 (W.D.N.Y. April 17, 2004), concerned General Motors' discontinuation of
19 certain motor vehicle lines or makes. In both cases, the courts held that the dealers
20 could not necessarily be precluded from maintaining a claim of constructive
21 termination due to the vehicle line discontinuations. By contrast, in this action,
22 Protestant's Protests do not concern something as definite and identifiable as a
23 discontinuation of any FCA motor vehicle line or make currently sold by the
24 Protestant. As further explained below, the instant Protests concern Protestant's mere
25 perception of a nebulous and indefinite future termination.

26 The other two cases cited by Protestant are *Petereit v. S.B. Thomas, Inc.*, 63 F.3d
27 1169, 1182 (2nd Cir. 1995) and *Carlos v. Philips Business Systems, Inc.*, 556 F.Supp.
28 769 (E.D.N.Y. 1983). Neither *Petereit* nor *Carlos* are relevant to whether the Board

1 has jurisdiction under Cal. Veh. Code § 3060 to hear purported constructive
2 termination claims because these two cases concern causes of action brought before
3 courts of general jurisdiction regarding, in *Petereit*, an alleged de facto termination of a
4 muffin franchisee in Connecticut and, in *Carlos*, an alleged de facto termination of a
5 distributor of dictation equipment in New Jersey.

6 ***D. The Board is without Authority to Grant the Relief Requested by Protestant.***

7 Protestant claims that FCA's citation, in its Motion to Dismiss, of *Hardin*
8 *Oldsmobile v. New Motor Vehicle Bd.*, 52 Cal. App. 4th 585, 591-94, 60 Cal. Rptr. 2d
9 583 (1997) was not on point because in that case, the "dealer's claims were found to be
10 outside the jurisdiction of the Board because the dealer sought damages rather than
11 relief specifically committed to the Board's jurisdiction." See Response at p. 8.

12 Contrary to Protestant's contention, FCA's citation of *Hardin Oldsmobile* is
13 directly on point because Protestant is also seeking a form of relief that the Board is
14 without jurisdiction to award. Let's consider what would occur in this case if the Board
15 denied FCA's Motion to Dismiss. In a protest brought pursuant to Veh. Code §
16 3060(a), the burden of proof is placed on the vehicle manufacturer or distributor to
17 prove good cause for the proposed termination. In this case however, FCA is not
18 attempting to terminate Protestant's dealer agreements. As such, there simply is no
19 termination for which to prove good cause.

20 Moreover, the action taken by FCA that Protestant claims constitute termination
21 is FCA's rejection of the Protestant's relocation proposal. The only cognizable type of
22 relief that could be awarded to remedy Protestant's claimed injury would be an order
23 requiring FCA to permit Protestant to relocate its dealership or some other type of
24 relief such as damages. In either case, the Board lacks jurisdiction and authority to
25 award such forms of relief. See *Hardin Oldsmobile*, 52 Cal. App. 4th at 595.

26 To that end, Protestant also argued in its Response that certain terms of its lease
27 agreement with FCA Realty ("Landlord") could also cause termination of Protestant's
28 dealer agreements because Protestant claims that it cannot afford to make its rent

1 payments. *See* Response at p. 5. Like Protestant's complaint that FCA would not
2 approve its relocation proposal, Protestant's apparent rent dispute is also outside the
3 jurisdiction of the Board. *Hardin Oldsmobile*, 52 Cal. App. 4th at 597.


4 CONCLUSION

5 Given that Protestant's allegations do not concern a termination of Protestant's
6 dealer agreement or any other issue within the Board's jurisdiction, the Board lacks
7 authority to consider the purported dispute described in the Protests. Try as Protestant
8 might, merely labeling this dispute as a "termination" does not bring this matter within
9 the jurisdiction of the Board.

10 For the reasons set forth above and the reasons articulated in FCA's Motion to
11 Dismiss, the Board should exercise its authority to dismiss the Protests with prejudice
12 and FCA respectfully requests that the Board dismiss the Protests with prejudice.

13 Dated: January 31, 2017

Respectfully submitted,

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PROOF OF SERVICE

CAPTION: MATHEW ENTERPRISE, INC., d/b/a STEVENS CREEK CHRYSLER JEEP
DODGE AND RAM, Protestant
v. FCA US, LLC, Respondent

BOARD: NEW MOTOR VEHICLE BOARD

PROTEST NOS.: PR-2484-16, PR-2485-16, PR-2486-16, and PR-2487-16

I am employed in the County of Sacramento, State of California. I am over the age of 18 years and not a party to this action. My business address is P.O. Box 277010, Sacramento, California 95827-7010.

On **January 31, 2017**, I served the foregoing **REPLY IN SUPPORT OF MOTION TO DISMISS PROTESTS** on each party in this action, as follows:

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- ☒ (BY MAIL) I caused such envelope to be deposited in the United States Mail at Sacramento, California, with postage thereon fully prepaid. I am readily familiar with the firm's practice of collection and processing documents for mailing. It is deposited with the United states postal service each day and that practice was followed in the ordinary course of business for the serve herein attested to.
- ☐ (BY FACSIMILE) The facsimile machine I used complied with California Rules of Court, Rule 2003, and no error was reported by the machine. Pursuant to California Rules of Court, Rule 2006(d), I caused the machine to print a transmission record of the transmission, a copy of which is attached to this Affidavit.
- ☐ (BY FEDERAL EXPRESS) I caused such envelope to be delivered by air courier, with the next day service.
- ☒ (BY E-MAIL) at the e-mail address listed above.

Executed on **January 31, 2017**, at Sacramento, California.

I declare under penalty of perjury that the foregoing is true and correct.


Erin Sanchez